



**Regional Road Maintenance ESA Forum**  
**155 Monroe Ave NE, Renton Washington 98155-4199**

May 12<sup>th</sup>, 2006

Bill Moore  
WA Department of Ecology  
Water Quality Program  
PO Box 47600  
Olympia, WA 98504-7600

RE: Western Washington Municipal NPDES Stormwater Comments

Dear Mr. Moore:

The Regional Road Maintenance ESA Program Stormwater Committee has reviewed the Western Washington Phase II Stormwater Draft Permit your group published for public review on February 15<sup>th</sup>, 2006. We wish to thank you for the opportunity to do this review. Our detailed comments on this permit are in the attached document. It is important that the permit be effective and achievable. The comments set forth in this letter and attachment are made to ensure that the time, effort, and money spent on this permit are used effectively to target improvements in water quality in Washington State. There are several general areas that are of serious concern to us and they are addressed below.

- **The Definition of Illicit Discharge** – The term “Discharge” is defined on page 44, line 37-38, *“for the purpose of this permit means, unless indicated otherwise, any discharge from a MS4 owned or operated by the permittee.”* The definition of Illicit Discharge as found on page 45, lines 24-27 should be changed to be consistent with the definition of discharge. This committee recommends that “Illicit discharge” means any discharge to a municipal separate storm sewer from a MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit; other than the NPDES permit for discharges from the municipal separate storm sewer and discharges resulting from fire fighting activities.
- **Pre-developed Forested Conditions** – The permit requires that mitigated stormwater flows meet a predevelopment forested condition. Conditions in urbanized and developed areas make this requirement unattainable and would put permittees in violation of their permit leaving them legally vulnerable. The mitigation requirements in the draft permit leaves jurisdictions vulnerable to “takings” claims. The *Nollan vs. California Coastal Commission* and *Dolan v. City of Tigard* cases, as well as a March 1995 memorandum from the State Attorney General’s Office specify that *“a permit condition which imposes substantial costs or limitations on property uses could be a taking. In assessing whether a regulation or permit condition constitutes a taking in a particular circumstance, the courts will consider the public purpose of the regulatory action along with the extent of reduction in use of and economic impact on the property. The burden on the property owner must be roughly proportional to the adverse public impact sought to be mitigated.”* This mitigation impact appears to contradict the above guidance from the Attorney General.

The committee’s recommendation is that the project proponent must mitigate flows to the actual predevelopment land use condition. This change is still in keeping with the anti-degradation water quality standard since it would not result in a lowering of the current water quality. This definition is also consistent with the December 8, 1999 Federal Register publishing of the Phase II rules page 68761: *“Pre-development refers to runoff conditions that exist onsite immediately before the planned development activities occur. Pre-development is not intended to be interpreted as that period before any human-induced land disturbance activity has occurred.”*

- **Outside Documents** – The permit cites outside documents such as the “2005 Stormwater Management Manual for Western Washington”; and “*Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessments*, Center for Watershed Protection, October 2004.” Both documents are cited as requirements and have not been through a regulatory process such as public review. As such they cannot be mandated as conditions through permit issuance nor serve as regulatory instruments. Ecology must allow that wherever the permittee is directed to outside documents that it is clearly stated that these are recommendations only and that other alternatives or equivalents are offered. References to the Western Washington Stormwater Manual must include language that references only the mandatory sections of the manual, and not the recommended sections or appendices. Permittees are not required to adopt the whole manual by reference alone. Appendix I continues to refer back to sections of the Manual that are not in the appendices. Ecology needs to ensure that all parts referenced in the Appendix text are contained within the document.
- **Annual Cost Tracking** – This committee does not see the value in the tracking of expenditures. The permit fact sheet states that “Cost data are needed to make determinations of practicability, compare effectiveness of programs and gauge budget and assistance needs.” Cost tracking is not a valid measure to gauge the Maximum Extent Practicable (MEP) standards established in this permit. Each jurisdiction has different organizational structures and accounting practices so reported costs will be incomparable. Therefore, it is improbable that Ecology will be able to compare reported costs and effectiveness, even for like programs, across municipalities. Further, it is not in this permit’s purview to gauge the permittees’ budgets or assess the need for assistance since Ecology and the Legislature have clearly indicated that funding will not be provided (above a minimal amount) for the compliance of the permit. For these reasons, the annual cost tracking requirement should be removed from the permit requirements. Cost tracking will require a significant amount of effort by agencies to modify their accounting practices and collect the data and the information will be of little or no value.
- **Catch Basin Inspection Program** – The intent of the catch basin inspection program should be outcome based and focus on allowing public agencies the flexibility to have a program that meets maintenance standards. This committee recommends the permit allow the expertise of local agencies in determining appropriate inspection program. Based on the experience of the local municipal employees, this approach would be a documented inspection program. The purpose of the inspection program is to protect water quality by examining the functionality and maintenance needs of the system and should not be based on inspecting every catch basin or stormwater facility within a given period of time. Further, the reporting requirement should be based on inspection program parameters and not solely on the number of catch basins inspected over a period of time. This committee requests that the “circuit basis” inspection program as cited in the Phase I Municipal Stormwater Permit in S5.C.9.b.iv.(1) be added to this permit.

There are concerns that the Department of Ecology does not have the staffing in place to properly support this permit program. The exposure to third party lawsuits will increase as a result of this permit without adequate support from Ecology. The permit should only include elements that can be accomplished by Ecology and the permittee.

Mr. Bill Moore  
Washington State Department of Ecology  
August 5, 2005  
Page 3

We wish to express our thanks and appreciation for the opportunity for this review. If you have any technical questions related to these issues please contact Douglas Navetski, the Stormwater Committee Chair at (206) 296-7723. We look forward to working with you on the implementation of this permit in a way that provides protection to the environment and uses solutions that are effective and attainable by our programs.

Sincerely,

Debbie Arima  
Regional Road Maintenance ESA Forum Chair

Attachment

Cc: Regional Road Maintenance Forum Members